IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE EX REL. JAMES DAVIS,
West Virginia, Prosecuting Attorney of Hancock County,

Petitioner,

v. **CIVIL ACTION NO.** 12-0603

THE HONORABLE FRED L. FOX II,
Judge of the First Judicial Circuit, and
JAMES MICHAEL SANDS,

Respondents.

PETITION FOR WRIT OF PROHIBITION

TO THE HONORABLE JUSTICES OF THE WEST VIRGINIA SUPREME COURT OF APPEALS:

Pursuant to West Virginia Code § 53-1-1 and Rule 14 of the West Virginia Rules of Appellate Procedure, James Davis, Prosecuting Attorney of Hancock County, West Virginia, hereby petitions for a writ prohibiting the Honorable Fred L. Fox II, sitting as a Judge of the First Judicial Circuit Court, State of West Virginia, from enforcing an Order entered in the Circuit Court of Hancock County, West Virginia, which dismissed a count of Felony Murder against James Michael Sands.

David F. Cross
Assistant Prosecuting Attorney
Hancock County, West Virginia
727 Charles Street
Wellsburg, West Virginia 26070
WV State Bar Number 5485

I.

PROCEEDINGS AND NATURE OF RULINGS

The Petitioner, James Davis, is the Prosecuting Attorney of Hancock County, West Virginia. Your Petitioner files this original proceeding in prohibition seeking to prohibit the Honorable Fred L. Fox II, sitting as a Judge of the First Judicial Circuit, from enforcing an Order entered in the Circuit Court of Hancock County, West Virginia, on the 19th day of April 2012, dismissing a count of Felony Murder against the Defendant in the underlying matter, James Michael Sands. This Writ of Prohibition prays that this Court will enter an Order prohibiting the Circuit Court of Hancock County, West Virginia, from dismissing the felony offense against James Michael Sands. Your Petitioner alleges that the Honorable Fred L. Fox II, sitting as a Judge of the First Judicial Circuit, abused his legitimate power and that the Court's action was so flagrant that it deprived the State of its right to prosecute this case and deprived the State of a valid conviction.

II.

STATEMENT OF FACTS

The evidence in this case shows that Defendant James Michael Sands and Dakota Givens attempted to burglarize a store in Weirton, West Virginia, located in Hancock County. In the course of the attempted burglary, the owner of the store shot and killed Givens. Subsequently, Sands was indicted by a grand jury in the Circuit Court of Hancock County on three charges: Felony Murder, Attempted Nighttime Burglary, and Conspiracy. On February 24, 2012, Sands filed a Motion to Dismiss Count I, Felony Murder, for Failure to Allege a Crime. A hearing was held on March 19, 2012, and on April 19, 2012, the Honorable Fred L. Fox II, sitting as a Judge of the First Judicial Circuit, issued an order granting the motion and dismissing the Felony Murder count of the indictment. The basis of the court's decision was that Sands could not be guilty under the Felony Murder statute, W. Va. Code § 61-2-1, because the victim of the killing in the course of the burglary was Givens, Sands's coconspirator.

Your Petitioner requests that this Honorable Court enter a Writ of prohibition prohibiting the Honorable Fred L. Fox II, from enforcing his Order dismissing the Felony Murder count of the indictment. The State alleges that the Court's action in dismissing the charge is an abuse of the Court's legitimate powers, and that the Court's action was so flagrant that it deprived the State of its right to prosecute the case and deprived the State of a valid conviction.

III.

ISSUE

Whether the Honorable Fred L. Fox II, sitting as a Judge of the First Judicial Circuit, exceeded his legitimate powers in entering an Order dismissing the Felony Murder count with prejudice and whether the Court's action was so flagrant that it deprived the State of its right to prosecute the case and obtain a valid conviction.

IV.

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V.

STANDARD OF REVIEW

The general standard for issuance of a writ of prohibition is set forth in West Virginia Code § 53-1-1, which states that prohibition shall lie "in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction exceeds its legitimate powers." This Court has adopted a five-factor test for determining when relief is appropriate because an inferior court has exceeded its legitimate powers: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft-repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. *State ex rel. Parsons v. Zakaib*, 207 W. Va. 385, 388, 532 S.E.2d 654, 657 (2000). Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. *Id.* Relief should be given to correct substantial abuses of discretion tantamount to a clear misapplication of applicable law. *Id.*

VI.

ARGUMENT

In deciding that the Felony Murder provision in West Virginia Code § 61-2-1 did not extend to the situation in which a coconspirator was killed by the victim during the commission of the felony, the Honorable Fred L. Fox II misapplied the clear language of the statute and misapplied a prior ruling of this Court. Moreover, the ruling was contrary to the better view of courts in other jurisdictions that have held in similar circumstances that a defendant may indeed be guilty of felony murder when a coconspirator ~~is killed by a victim of the underlying felony.~~

Section 61-2-1 states:

> First and second degree murder defined; allegations in indictment for homicide
>
> ~~*Murder* by poison, lying in wait, imprisonment, starving, or by any willful, deliberate~~ and premeditated killing, or *in the commission of, or attempt to commit,* arson, kidnapping, sexual assault, robbery, *burglary*, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, *is murder of the first degree*. All other murder is murder of the second degree.
>
> In an indictment for murder and manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased.

W. Va. Code § 61-2-1 (emphasis added).

The primary obligation of the court in applying a statute is to give it the plain meaning apparent from its language. As stated in *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010):

> "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).

Id. at 236, 700 S.E. at 296. In the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary, and accepted meaning. *W.V. Employers' Mut. Ins. Co. v. Summit Point Raceway Assocs.*, 228 W. Va. 360, 719 S.E.2d 830 (2011).

There is no ambiguity in section 61-2-1. The plain language of the statute requires proof of only three elements to support a conviction for Felony Murder: (1) a death (2) occurring in the commission of, or the attempt to commit, one of the listed underlying crimes (3) by the defendant. Nothing in the statute specifies that felony murder can be proven only when it is the person committing the underlying felony who causes the death to occur, and nothing in the statute specifies that the person killed during the felony must be the victim of the felony. The statute is silent with regard to a requirement relating to the status of the victim and with regard to the status of the person who causes the death.

The ruling of the Honorable Fred L. Fox II, misapplied these legal principles by finding ambiguity where there is none. He also misapplied prior case law by relying on rulings of prior cases that are easily distinguishable from the present case on critical factual bases. For example, Judge Fox misstated the elements of Felony Murder by stating that one element was "the death of the victim as a result of injuries received" during the commission of a felony, citing *State v. Wade*, 200 W. Va. 637, 490 S.E.2d 724 (1997), *State v. Mayle*, 178 W. Va. 26, 357 S.E.2d 219 (1987), and *State v. Williams*, 172 W. Va. 295, 305 S.E.2d 251 (1983). An examination of these cases reveals that in each case, the person killed during the crimes was indeed the victim of the underlying felony, and the issue before Judge Fox was neither presented nor decided in these cases. The cases thus offered no insight on whether the Felony Murder statute requires proof of the death of the victim.

Even more erroneous was Judge Fox's discussion of *State ex rel. Painter v. Zakaib*, 186 W. Va. 82, 411 S.E.2d 25 (1991), which he interpreted as supporting dismissal of the Felony Murder charge against Sands because it was one of the participants in the underlying felony who had died. In fact, the holding of the court in *Zakaib* rested on the dual grounds that the death was a suicide and had occurred after the commission of the underlying burglary attempt. Although Judge Fox noted that the death in *Zakaib* occurred after a failed attempt to release a captured cohort, he did not catch the significance of the court's discussion of the nature and timing of the death. The court in that case made it clear that the type of death and the sequence of events was critical to its holding:

> The problem with the State's attempt to try the petitioner for felony-murder is that in this case *there was no homicide incidental to the alleged underlying felony of attempted burglary*. Instead, there was a suicide which was committed not by an innocent bystander, but by a co-conspirator in the criminal enterprise. The petitioner neither intended for the victim's death to occur, nor did he cause it, accidently or otherwise.
>
> Although the circumstances under which the victim's death occurred are both unfortunate and tragic, *ultimately he was responsible for his own death.* It is for this reason that the State's attempt to hold the petitioner legally responsible for Woolwine's death must fail. The first-degree murder statute simply does not support a felony-murder charge against the petitioner under facts such as these.

Id. at 83-84, 411 S.E.2d at 26-27 (emphasis added).

Moreover, although Judge Fox pointed to several cases from other jurisdictions to support his position, in fact the better view from other jurisdictions supports a finding of Felony Murder whenever a death has been caused during the commission of a felony, even when that death is of one of the participants in the crime rather than a victim. In *Mikenas v. State*, 367 So. 2d 606 (Fla. 1978), for example, the court faced the same issue as was presented in the case below and determined that the defendant could be convicted of felony murder even though the deceased was the defendants' coparticipant in a robbery, who was shot by a deputy sheriff during the robbery. The controlling

factor for the court in *Mikenas* was the fact that the language of the Felony Murder statute did not differentiate between the death of an innocent person and that of a guilty person. The court stated:

> The appellant contends that Section 782.04(3), Florida Statutes (1975) is inapplicable to the facts of his case. He, in effect, says that it is clear from the evidence that Barker, the auxiliary deputy sheriff, shot and killed Vito. If this is true, he says, and Vito is a co-perpetrator, no one can be charged with the murder of Vito. He argues that only "innocent" persons killed during the perpetration of a felony were intended by the Legislature to be included in the phrase "a person is killed." From this posture, he asserts that his motion to dismiss should have been granted.
>
> The language of Section 782.04(3) is not ambiguous or vague. It refers to "a person" and must mean "any person." *If the Legislature had intended something other than this, it could have inserted the word "innocent."*

Id. at 609 (emphasis added.) The very same reasoning governs the present case, as it is clear that W. Virginia Code § 61-2-1 does not differentiate between deaths of guilty or innocent persons during the commission of a felony.

In *State v. Wright*, 379 So. 2d 96 (Fla. 1979), the court reaffirmed the ruling in *Mikenas*, holding squarely that "a surviving co-perpetrator of a robbery is guilty of felony murder in the second degree when a policeman shoots and kills another co-perpetrator during the perpetration of the robbery." *Id.* at 96. Numerous other cases have reached the same conclusion. *See Naranjo v. McCann*, No. 08 C 7358, 2009 WL 2231775 (N.D. Ill. July 27,2009) (a defendant's conviction under the Illinois felony murder rule under a proximate cause theory of liability did not violate his due process rights; the defendant was criminally liable for first-degree murder for the death of his 14-year-old cofelon where, during a home invasion, one of the home's occupants shot and killed his cofelon); *Howard v State*, 545 So. 2d 352 (Fla. Dist. Ct. App. 1989) (where both the defendant and cofelon were engaged in the perpetration of the underlying felony of possession with intent to sell cocaine at the time of the cofelon's death, neither the fact that the cofelon killed himself (as opposed to killing a bystander or third party), nor the fact that the defendant was not in actual possession of

the cocaine ingested by the cofelon, absolved the defendant from guilt under the felony murder statute); *People v. Klebanowski*, 852 N.E.2d 813 (Ill. 2006) (killing of felony murder defendant's cofelon by robbery victim during armed robbery was within operation of the felony murder rule such that defendant could be held liable for death of cofelon); *Forney v. State,* 742 N.E.2d 934 (Ind. 2001) (the felony murder rule applies when, in committing any of the designated felonies, the felon contributes to the death of any person; thus, it matters not whether the death caused is that of the intended victim, a passerby, or even a co-perpetrator); *State v. Hoang*, 755 P.2d 7 (Kan. 1988) (to support conviction for felony-murder, all that State need prove is that felony was being committed, that felony was inherently dangerous to human life, and that homicide that followed was direct result of commission of felony; felony-murder doctrine was broad enough to include accidental death of defendant's accomplice during commission of arson); *State v. Baker*, 607 S.W.2d 153 (Mo. 1980) (the identity of the deceased is not a factor affecting the criminal responsibility of a defendant under a felony murder charge; it is of no concern that the fatal shot has been fired by person acting to thwart rather than further commission of the underlying felony); *State v. Morran*, 306 P.2d 679 (Mont. 1957) (the trial judge correctly stated the law insofar as it concerned the felony murder statute, by instructing the jury that if a conspiracy and agreement is to do or perform an unlawful act constituting a felony, and in the prosecution of such unlawful act, an individual is killed or death ensues, such killing is murder in the first degree; and if, in carrying out such crime the deceased cofelon was killed, then such killing was murder in the first degree and the defendant would be guilty thereof, even though he was not present and did not actually assent to the killing of the cofelon); *State v. Martin*, 573 A.2d 1359 (N.J. 1990) (with regard to death of co-felon, court noted that the state felony murder statute had no requirement that death be caused by one of the participants, and thus the statute extended to apply to homicides committed by persons other than the actor

committing the felony); *State v. Burton*, 325 A.2d 856 (N.J. Super. Ct. Law Div. 1974) (if a defendant's cofelon is shot and killed by the police during the commission of a robbery, this death can be imputed to the defendant under the felony murder statute); *Dickens v. State*, 106 P.3d 599 (defendant was involved in the robbery when his armed accomplice was shot and killed by officer during attempted escape, and thus defendant was liable for first-degree felony murder, for accomplice's death); *State v. Oimen*, 516 N.W.2d 399 (Wis. 1994) (felony murder statute allows defendant to be charged with felony murder when cofelon is killed by the intended felony victim).

As these cases demonstrate, the better view in jurisdictions around the country is that where the felony murder statute does not specify that a felony murder victim must be a victim of the underlying felony, the statute covers all deaths occurring during the commission of the underlying felony, including deaths of coperpertrators who are killed by felony victims or law enforcement officers. By failing to recognize this better view, Judge Fox misapplied the law and abused his legitimate power.

VII.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner states that no oral argument is necessary because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

VIII.

REQUESTED RELIEF

WHEREFORE, the Petitioner prays that the Court grant the requested Writ of Prohibition based upon the lower court's error as a matter of law and enter an Order prohibiting the enforcement of the lower court's order and remanding the matter back to the Circuit Court of Hancock County, West Virginia, with a direction to the lower court to make a finding of guilt or innocence based upon the correct application of law.

Respectfully Submitted,

David F. Cross

David F. Cross, Esquire
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New Cumberland, WV 26047
Telephone: (304) 564-3933

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF HANCOCK, *to-wit:*

Before me, the undersigned Notary Public, personally appeared, David F. Cross, who being duly sworn according to law deposes and says that the facts set forth in the foregoing Petition for Writ of Prohibition are true and correct to the best of his knowledge, information and belief.

David F. Cross
DAVID F. CROSS

Taken, sworn to and subscribed before me this 14th day of May, 2012.

My commission expires: February 9, 2019

Alisa D. Smith
NOTARY PUBLIC

NOTARY PUBLIC OFFICIAL SEAL
STATE OF WEST VIRGINIA
ALISA D. SMITH
C/O ATTY. DAVID B.CROSS
727 CHARLES ST.
WELLSBURG, WV 26070
MY COMMISSION EXPIRES FEB. 9, 2019

CERTIFICATE OF SERVICE

Service of the foregoing STATE'S NOTICE OF PETITION FOR WRIT OF PROHIBITION and the WRIT OF PROHIBITION has been made on the defendant by mailing a true and correct copy thereof by first-class U.S. mail, postage prepaid, to

The Honorable Judge
Fred L. Fox II
c/o Attorney General Darrell McGraw
State Capitol Complex, Building 1, Room E-26
Charleston, WV 25305

Martin P. Sheehan, Esquire
Sheehan & Nugent, P.L.L.C.
41 Fifteenth Street
Wheeling, WV 26003

and

Amanda M. Mesler, Esquire
Mesler Law Offices
Post Office Box 2046
Weirton, WV 26062

on the 14th day of May 2012.

David F. Cross

David F. Cross, Esquire